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Attach the correct warning statement

Practitioners will be aware that s 366 (1) of the *Property Agents and Motor Dealers Act 2000* provides that a relevant contract must have attached, as its first or top sheet, a warning statement in the approved form. A failure to attach a warning statement in the prescribed manner triggers a right of termination in the buyer. The factual circumstances in *Devine Ltd v Timbs* [2004] QSC 24 are indicative of the problems that may arise in the construction of this statutory provision.

The application concerned put and call option agreements entered into concerning 4 lots. The agreements, in identical terms, were signed before the applicant seller had completed a proposed residential apartment building. In each case the option agreement provided that the agreement was not binding on the seller until and unless the purchaser returned to the seller, amongst other things, two copies of the warning statement under the *Property Agents and Motor Dealers Act 2000* signed by the purchaser and two copies of the contract document signed by the purchaser. The seller was required to hold the contract documentation in escrow and was forbidden to sign it until and unless either option was exercised.

The seller subsequently exercised its put option; the contracts were signed on the seller's behalf and the seller required that settlement take place. On the day proposed for settlement the buyer purported to elect to terminate the contracts relying, in part, on the seller's failure to attach a warning statement in the approved form, then current. Due to the delay between when the documentation was signed by the buyer and when the seller exercised its put option, the warning statement was in a substantially different form. For the buyer it was argued that the contract only came into existence when the put option was exercised and the seller had not complied with its statutory obligation due to its reliance on a substantially different version of the warning statement.

Decision

Helman J noted that it was not in issue that the warning statement attached to the contract documents was the then current form nor was it in issue that by the time the put option was exercised a new form had been approved. The real dispute centred on the relevant date for the application of the statute. Was it the date of execution of the option agreement or, as contended by the purchaser, the date when the put options were exercised and the seller signed the contract documents it had held in escrow?

On behalf of the seller it was argued that the date of signature by the purchaser was the relevant date as it was then that, pursuant to the option agreements, the purchaser became bound by the terms of the proposed sale contract subject only to the exercise by the seller of its put option. On this basis the relevant warning statement would be the one in the form approved at the time when the buyer signed the contract documentation.

Helman J accepted the seller's contention as being correct. This contention was consistent with the sequence of events contemplated by the legislation namely that the buyer would sign the warning statement before signing the contract. Furthermore, to construe the legislation in this manner best achieved one of the key objects of the *Property Agents and Motor Dealers Act 2000* namely consumer protection.

Comment

The operation of the *Property Agents and Motor Dealers Act 2000* remains problematic in the context of option agreements, particularly put options. Whilst it is to be hoped that the outcome of the present review of the legislation may ameliorate this position, the decision of Helman J is to be welcomed as providing some commercial certainty in circumstances of 'off the plan' option documentation where there is always a possibility that statutory forms may further evolve in the interim.

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